a

NEDUNCHELIAN V UTHIRADAM

v.

NURSHAFIQAH MAH SINGAI ANNAL & ORS

b

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[ORIGINATING SUMMONS NO: [MT-1] 24-1011-2003]
23 OCTOBER 2003

c

FAMILY LAW: *Children - Religion - Conversion - Conversion of religion of minor children from Hindu faith to Islamic faith without father's consent - Whether father could challenge Syariah Court order in civil court - Whether mother's consent sufficient to sanction conversion - Federal Constitution, arts. 12, 121(1A), 160 - Syariah Courts Enactment 1993 (Johor), ss. 4, 5, 11(b), 19 - Islamic Family Law Enactment 1990 (Johor), s. 2*

d

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Conversion of religion of minor children from Hindu faith to Islamic faith without father's consent - Proper forum to hear case - Whether civil court or Syariah Court - Federal Constitution, arts. 12, 121(1A), 160 - Syariah Courts Enactment 1993 (Johor), ss. 4, 5, 11(b), 19 - Islamic Family Law Enactment 1990 (Johor), s. 2*

e

WORDS & PHRASES: *"parent" - Article 12(4) Federal Constitution - Parent to determine religion of children below 18 years - Whether "parent" meant in plural or singular*

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This was an application by the plaintiff father seeking primarily to invalidate a Syariah Court order obtained by the 1st defendant mother converting their minor children from the Hindu faith to the Islamic faith. The 1st defendant converted the children after converting herself. A preliminary objection ('PO') was raised on behalf of the defendants on whether this court had the jurisdiction to hear the application.

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Held (allowing the PO and dismissing the application):

[1] The civil courts have no jurisdiction over matters falling within the jurisdiction of the Syariah Court by virtue of art. 121(1A) of the Federal Constitution ('the Constitution') and established by case authorities. In determining whether a matter falls within the jurisdiction of the civil courts or the Syariah Courts, the civil courts prefer to adopt the subject matter approach instead of the remedy approach. The subject matter approach is

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supported by the decision of the Federal Court in *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor*. The Federal Court was unanimously of the view that the question of conversion is a subject matter that falls under the jurisdiction of the Syariah Courts and therefore the jurisdiction of the High Court to adjudicate on the question is excluded by virtue of art. 121(1A) of the Constitution. (pp 310 b, 311 f-h & 312 a)

[2] The subject matter of the plaintiff's application was to declare invalid the order of the Syariah Court. The said order related to: (1) the dissolution of the 1st defendant's marriage by reason of her conversion to Islam; (2) the confirmation of the Islamic status of the four children; (3) the four children following the Islamic status of the 1st defendant arising from her conversion; and (4) custody and guardianship of the four children in favour of the 1st defendant and restraining the plaintiff from harassing and interfering with them. Sections 5 and 11(b) of the Syariah Courts Enactment 1993 (Johor) clearly and expressly established the Syariah Court's jurisdiction over such matters and consequently excluded this court's civil jurisdiction. (p 312 e-g)

[3] Article 121(1A) of the Constitution was introduced to prevent a conflict of jurisdiction and not to exacerbate the jurisdictional conflict between the High Court and the Syariah Court. Hence, the mechanism used to resolve such conflict must never lose perspective of this legislative intent. The mechanism to be adopted must be predicated by the subject matter rather than the religion of the individual who is challenging the Syariah Court's jurisdiction. The fact that a non-Muslim cannot plead before the Syariah Court is not by itself a ground for conferring jurisdiction on the High Court. (p 313 g-h)

[4] Article 12(4) of the Constitution provides that only a parent or guardian can determine the religion of a person below the age of 18. The word "parent" is framed in the singular. Although the singular includes the plural under art. 160(1) Constitution, the word "parent" in the singular clearly gives rise as to whether it was intentionally inserted to read in the singular. Article 160B of the Constitution provides that the authoritative text of the Constitution is the national language text and the equivalent term of parent therein is "ibu bapa" which is interpreted in the singular sense. The plural sense in the national language is referred to as "kedua ibu bapa". That being the case the intention of the framers of the Constitution in placing the word "parent" in the singular clearly intended it to be construed as such. (p 314 b-e)

[5] The four children, being below 18 years of age and statutorily prohibited from electing the religion of their choice were merely following the religion of their mother who had converted to Islam. That was permissible and did not in any way offend the provisions of art. 12(4) of the Constitution. Further, s. 2(1) of the Islamic Family Law Enactment 1990 (Johor) conferred the Syariah Court jurisdiction over the four children. Case authorities too have repeatedly stressed and established that the High Court in its civil jurisdiction cannot challenge, dispute, vary, strike out, declare and/or injunct the execution of an order of the Syariah Court. (pp 314 f-g & 315 e-h)

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(refd)***

Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam dan Majlis Ugama Islam Sabah & Ors [2003] 1 CLJ 458 HC ***(refd)***

Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia dan Yang Lain & Rayuan Yang Lain [2002] 3 CLJ 766 CA ***(refd)***

Majlis Agama Islam Negeri Sembilan lwn. Hun Mun Meng [1993] 1 CLJ 179 HC ***(refd)***

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(refd)***

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur [1997] 4 CLJ Supp 419 HC ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***

Sukma Darmawan Sasmitaat Madja lwn. Ketua Pengarah Penjara Malaysia [1999] 1 CLJ 481 CA ***(refd)***

Legislation referred to:

Federal Constitution, art. 12(4), 121(1A), 160(1), s. 2(95) of Eleventh Schedule
Government Proceedings Act 1956, ss. 2, 29(2)
Islamic Family Law Enactment 1990 (Johor), s. 2(1)
Specific Relief Act 1950, s. 44, Chapter VIII
Syariah Courts Enactment 1993 (Johor), ss. 4, 5, 11(b), 19

For the plaintiff - Gobind Singh Deo; M/s Karpal Singh & Co
For 1st defendant - Zainab Jan (Ungku Mohsin with her); M/s Ungku Mohsin & Zainab Jan
For the 6th, 8th & 10th defendants - Yaakob Sam SLA
For the 9th defendant - Kamaludin Mohd Said SFC

Reported by Usha Thiagarajah

JUDGMENT

Syed Ahmad Helmy JC:

The plaintiff herein who is the husband of the 1st defendant filed an application in encl. 4 seeking the following principal reliefs, the English translation of which reads as follows:

1. A declaration that the four minor children, cited as the second, third, fourth and fifth defendants is and was at all material times of the Hindu faith.

2. A declaration that the pronouncement by the 9th defendant that the second, third, fourth and fifth defendants have been converted to the religion of Islam is invalid void and contrary to law.

3. A declaration that the orders made by the 7th defendant dated 22 April 2003 to the extent of its applicability to the plaintiff, the second, third, fourth and fifth defendant is invalid and void and does not bind the second, third, fourth and fifth defendants.

4. Injunction restraining the 7th defendant and/or the first defendant from continuing with the proceeding in Mahkamah Tinggi Syariah Johor Bahru. Kes Mal Bil. 01.100.099.41 Tahun 2003 and execution of the earlier orders made in the proceedings against the second, third, fourth and fifth defendants.

The plaintiff also by encl. 3 applied by way of summons-in-chambers for an injunction restraining the first defendant and/or 7th defendant and/or the 8th defendant in person or through their agent from serving and/or executing the order of the 7th defendant dated 22 April 2003 against the plaintiff and/or the second, third, fourth and fifth defendant until the final disposal of the action herein.

From the prayers aforesaid the essence of the subject matter of plaintiff's application is the challenge against the order of the Johor Syariah High Court dated 22 April 2003 in Kes Mal Bil. 01.100.099.41 of 2003 and the reliefs as prayed for is for an interlocutory injunction to restrain execution of the order of the Syariah High Court aforesaid.

In the face of the challenge made the defendants raised a preliminary objection and as agreed by the parties herein the objection relates to the question of the jurisdictional conundrum of the High Court to adjudicate on the subject matter and reliefs prayed for.

The basis of the preliminary objection is undoubtedly founded on art. 121(1A) of the Federal Constitution which was an amendment made *vide* Act A704/88 which came into effect on 10 August 1988. Article 121(1A) stipulates to the effect that the High Court shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

With the introduction of art. 121(1A) it is settled law that the Civil Courts have no jurisdiction over matters falling within the jurisdiction of the Syariah Court as established by a plethora of cases.

As was aptly stated by Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77:

> The new cl. 1A of Article 121 of the Constitution effective from 10th June 1988 has taken away the jurisdiction of the civil courts in matters within the jurisdiction of the Syariah Courts.

The intention and objective behind the introduction of art. 121(1A) was neatly summed up by Harun Hashim SCJ in *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1992] 2 MLJ 793 at p. 804 para A:

> What art. 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic Laws. In other words, art. 121(1A) is a provision to prevent conflicting jurisdiction between the civil courts and the Syariah Courts.

The plaintiff in opposing the preliminary objection on the jurisdictional issue of this court advanced very forceful arguments as to why the civil court is the appropriate forum to adjudicate on the subject matter and reliefs prayed for by the plaintiffs. It is the submission of learned counsel for the plaintiff that art. 121(1A) has no application against the plaintiff who is not a person of the Islamic faith as the combined provisions of s. 4 and 19 of the Syariah Court Enactment 1993 only applies to Muslims and that decisions of the Syariah Court does not affect the rights of a non-Muslim.

The plaintiff further relied on art. 12(4) of the Federal Constitution in support of his contention that the High Court is seised with the jurisdiction to grant the declaratory relief to the effect that the 4 children of the marriage namely the second, third, fourth and fifth defendants are in fact not Muslims but Hindus as the wording of the word "parent" in art. 12(4) must be read in the plural in that both parents' consent are needed for the conversion of the children's religion to Islam. In support of his argument he relied on the High Court case of *Chang Ah Mee (f) v. Jabatan Hal Ehwal Agama Islam dan Majlis Ugama Islam Sabah & 2 Ors* [2003] 1 CLJ 458 and s. 2(95) of the Eleventh Schedule (art. 160(1)) of the Federal Constitution.

In *Chang Ah Mee*'s case *(supra)* Ian Chin J at p. 584-585 stated:

> The Constitution does not discriminate against the sexes and since the father and mother have equal right over the person and property of the infant, the term "parent" in article 12(4) must necessary mean both the father and the mother if both are living.

Section 2(95) of Eleventh Schedule (art. 160(1)) of the Federal Constitution provides:

> Constitution of singular or plural – words in the singular include the plural and words in the plural include the singular.

As against the objection of learned federal counsel that injunctive relief prayed for cannot be made against the eighth and tenth defendant by virtue of their status as officers of the Government and the strict prohibition under s. 29(2) of the Government Proceedings Act 1956 the plaintiff's counsel submits that s. 29(2) of the Government Proceedings Act 1956 has no application to the plaintiff's action herein which was made under s. 44 of the Specific Relief Act 1950 which by reason of the definition section in s. 2 of the Government Proceeding Act 1956 excludes proceedings under Chapter VIII of the Specific Relief Act 1950.

The solution to this intractable problem of jurisdiction would invariably involve an appraisal of the approach to be adopted as established by judicial precedents and its application to the factual matrix herein with a view of arriving at a mechanism to achieve the objective of art. 121(1A) in preventing conflicting jurisdiction between the civil courts and the Syariah Courts.

In determining whether a matter falls within the jurisdiction of the civil courts or the Syariah Courts the preferred view of the approach adopted by the civil court is the subject matter approach instead of the remedy approach.

The subject matter approach as the preferred approach is supported by high authority in the form of the Federal Court decision of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 2 CLJ 5 where the Federal Court ruled the jurisdictional conflict through the subject matter approach and not the remedy prayed for approach notwithstanding that it was for declaratory relief that the applicant was no longer a Muslim. In establishing the subject matter approach the Federal Court was unanimously of the view that since the question of conversion is a subject matter which fell under the jurisdiction of the Syariah Courts the jurisdiction of the High Courts to adjudicate on the question was excluded by virtue of

art. 121(1A) of the Federal Constitution. The subject matter approach has been consistently adopted by our courts as evidenced by *Abdul Shaik bin Md. Ibrahim & Anor v. Hussein bin Ibrahim & 2 Ors* [1999] 3 CLJ 539; *Kamariah bt Ali lwn. Kerajaan Negeri Kelantan, Malaysia dan Yang Lain (dan 3 rayuan yang lain)* [2002] 3 CLJ 766; *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & 2 Ors* [2003] 3 CLJ 289; *Majlis Agama Islam Negeri Sembilan lwn. Hun Mun Meng* [1993] 1 CLJ 179; *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1997] 4 CLJ Supp 419 and *Mohamad Habibullah*'s case *(supra)*;

It is also appropriate at this juncture to stress the rationale behind the preference of the subject matter approach over the remedy prayed for approach. As was stated by Abdul Kadir Sulaiman J in *Md Hakim Lee*'s case *(supra)* at pp. 80 and 85 respectively:

> The issue is not one whether a litigant can get his remedies but one of jurisdiction of the Courts to adjudicate – the threshold jurisdiction to be seised of the matter ...
>
> ... The fact that the Plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the civil court.

Applying the subject matter approach I have now to ascertain whether the subject matter of the plaintiff's application herein, namely to declare invalid the several orders as found in the Johor Bahru Syariah High Court order dated 22 April 2003 is a matter which is not caught by art. 121(1A).

Upon perusing the Syariah High Court order dated 22 April 2003 it relates to 4 matters, namely the dissolution of the first defendant's marriage by reason of her conversion to Islam; the confirmation of the Islamic status of the four children, the 2nd, 3rd, 4th and 5th defendant by following the Islamic status of the first defendant arising from her conversion; custody and guardianship of the four children in favour of the 1st defendant and restraining plaintiff from harassing interfering with the 1st defendant and her four children.

A scrutiny of the relevant statute namely the Syariah Courts Enactment 1993 (Johor) and in particular to s. 5 and 11(b) thereof clearly and expressly establish the Syariah Court's jurisdiction over the subject matter and consequently excluding this court's civil jurisdiction.

All the 4 matters as detailed aforesaid are matters which is covered by s. 11(b) which is the empowering section conferring civil jurisdiction to the Syariah High Court to adjudicate on the subject matter herein.

Section 11(b) Enakmen Mahkamah Syariah 1993 provides that:

> dalam bidang kuasa sivil, mendengar dan memutuskan semua tindakan dan prosiding yang berkaitan dengan:
>
> (i) pertunangan, pernikahan, perceraian, pembatalan perkahwinan (fasakh) atau perpisahan kehakiman (faraq);
>
> (ii) apa-apa pelupusan harta atau tuntutan harta yang berbangkit daripada perkara-perkara yang diprihalkan di dalam sub-perenggan (i);
>
> (iii) nafkah orang-orang tanggungan, sahtaraf Hadhanah atau penjagaan kanak-kanak;
>
> (iv) pembahagian atau tuntutan harta sepencarian;
>
> (v) wasiat atau pemberian pada maradhul maut seseorang simati Islam;
>
> (vi) pemberian semasa hidup atau penyelesaian yang dibuat tanpa balasan yang mencukupi dengan wang atau benda yang bernilai wang oleh seseorang Islam;
>
> (vii) wakaf atau nazar;
>
> (viii) membahagikan atau pewarisan harta di bawah sesuatu wasiat;
>
> (ix) isbat waris, nasab dan mati;
>
> (x) perkara-perkara lain yang berkenaan dengannya bidang kuasa diberi oleh mana-mana undang-undang bertulis.

In the light of the express provisions aforesaid the proper approach towards adjudication of the jurisdictional conundrum is to ask the question whether it is permissible for the plaintiff to plead his case in the High Court in respect of a matter which falls within the jurisdiction of the Syariah Court.

The question posed must surely be answered in the negative.

The court must not lose perspective of the legislative intent that art. 121(1A) was to prevent conflict of jurisdiction and not to exacerbate the jurisdictional conflict between the High Court and Syariah Court.

Hence the mechanism used to resolve such conflict must never lose perspective of the legislative intent aforesaid and to my mind the mechanism to be adopted must be predicated by the subject matter rather than the religion of the individual who is challenging the Syariah Court's jurisdiction. This is because the fact that a non-Muslim cannot plead before the Syariah Court cannot by itself be a ground for conferring jurisdiction to the High Court.

I shall now address the plaintiff's argument on art. 12(4) of the Federal Constitution which provides as follows:

> (4). For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

Article 12(4) Constitution is a restatement of the law that the religion of a person below the age of 18 can only be determined by his parent or guardian – as affirmed by *Teoh Eng Huat*'s case – it does not state or cover the situation where a minor follows the religion of his parent as happened here where all the four children did not make an independent election of converting to Islam but as held by the Syariah Court merely followed the religion of the mother who had converted to Islam. In short art. 12(4) does not prohibit the minor from following the religion of his parent – the word parent herein being framed in the singular. Though under art. 160(1) the singular includes the plural nevertheless the placement of the word parent in the singular clearly gives rise as to whether it was intentionally inserted as such to be read in the singular. Interestingly enough art. 160B expressly states that the authoritative text of the Constitution is the Bahasa text and hence when the equivalent term of parent which is "ibu bapa" in the Bahasa text is construed it invariably is interpreted in the singular sense as the plural sense would be kedua ibu bapa in the Bahasa text. That being the case the intention of the framers of the Constitution in placing the word parent in the singular clearly intended it to be such. Hence based on the reasoning aforesaid I have to respectfully differ from the views expressed in *Chang Ah Mee*'s case *(supra)*.

The intention as such is reinforced in the context of children below 18 years of age being prohibited from electing the religion of their choice as their choice must surely be subordinated to the religion of their parent. Being subordinate to the religion of their parent interpreted singularly as reasoned aforesaid it follows in the context herein that upon the mother's conversion the four children being below 18 years of age and statutorily prohibited from electing the religion of their choice is merely following the religion of the mother who has converted to Islam, which to my mind is permissible and does not in any way offend the provisions of art. 12(4) of the Federal Constitution. This fact of the four children following the religion of the mother and not exercising an election as to their religious choice is reflected in the finding of the Syariah Court's ground of judgment on the custody issue:

Keempat-empat orang anak yang berumur di bawah 18 tahun. Keempat-empat anak telah mengikut ibunya memeluk agama Islam. Bapa anak-anak itu masih belum beragama Islam. Mengikut hukum syarak dalam Madzhab Shafie rujuk kitab al-Majmuk juzuk 18 mukasurat 120 ...

> Maksudnya: Apabila masuk Islam seorang lelaki dan baginya ada anak yang masih kecil, anak itu mengikutnya jadi Islam.
>
> Apabila seorang perempuan dan dia ada anak yang masih kecil, anak itu mengikutnya masuk Islam kerana ibunya itu salah seorang ibu bapanya maka hukum anak itu jadi Islam seperti mengikut Islam bapanya.
>
> Dan apabila masuk Islam salah seorang dari ibu bapanya maka anak itu dihukum Islam kerana mengikut Islam salah seorang ibu bapanya kerana agama Islam itu mengatasi dari agama yang lain itu adalah hak Allah s.w.t ...

Dalam kes ini keempat-empat anak telah mengikut ibunya dan telah didaftarkan Islamnya di Jabatan Agama dan telah sah Islamnya walaupun anak itu belum mencapai umur 18 tahun mengikut Perlembagaan Malaysia tetapi anak itu telah mengikut ibunya.

It is also appropriate to stress the Syariah Courts jurisdiction over the four children by reason of the definition s. 2(1) of the Enakmen Undang-Undang Keluarga Islam 1990 (Johor) wherein the definition of "orang Islam" is defined:

> "Orang Islam" ertinya orang yang berketurunan daripada kedua atau salah seorang ibu bapanya orang Islam atau orang yang telah memeluk agama Islam di bawah Enakmen dan tidak pula membuat perisytiharan keluar daripada agama Islam atau dengan Hukum Istilak menurut Hukum Syarak.

Hence since the mother has converted to Islam and the consequential following of the mother's new faith by the 4 minor children by reason of the definition aforesaid the Enakmen Undang-Undang Keluarga Islam 1990 (Johor) is applicable for the Syariah Court to be conferred jurisdiction to adjudicate of matters relating to the four children which adjudication is valid and binding on the four children.

Case authorities have repeatedly stressed and established that the High Court in its civil jurisdiction cannot challenge and or dispute and/or vary, strike out or declare or injunct the execution of an order of the Syariah Court – see *Sukma Darmawan Sasmitaat Madja lwn. Ketua Pengarah Penjara Malaysia* [1999] 1 CLJ 481; *Kamariah bt Ali lwn. Kerajaan Negeri Kelantan, Malaysia dan Yang Lain (dan 3 Rayuan Yang Lain)* [2002] 3 CLJ 766.

By reason of my ruling of the jurisdictional issue aforesaid I do not think it is necessary for me to adjudicate on the issue as to the applicability of s. 29(2) of the Government Proceedings Act 1956 against the eighth and tenth defendant.

In conclusion the 1st and 9th defendants preliminary objection on the jurisdictional issue is allowed and the plaintiff's application in encls. 3 and 4 is accordingly dismissed with costs.